INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the summative (or formal) assessment for Module 1 ***of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***

2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters*** – please do not change the document settings in any way. DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***

3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***

4. ***You must save this document using the following format:*** [studentID.assessment1summative]***. An example would be something along the following lines: 202223-363.assessment1summative.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked***.***

5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments.*** Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words***.***

6. ***The final submission date for this assessment is*** 15 November 2022***. The assessment submission portal will close at*** 23:00 (11 pm) GMT on 15 November 2022***. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 10 pages***.***

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct***. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph*** in yellow***. Select only*** ONE ***answer. Candidates who select more than one answer will receive no mark for that specific question.***

Question 1.1

Civil Law and English (Common) Law countries have the same historical roots. Select from the following the best response ***to this statement.***

(a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.

(b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16th century onwards.

(c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.

(d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.

Question 1.2

Both Civil Law and English Law systems in general allowed for a rather liberal discharge of debt for over-indebted debtors right from the inception of these systems. Select from the following the best response ***to this statement.***

(a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.

(b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.

(c) This statement is untrue since discharge of debt never became part of any of these systems.

(d) This statement is true since creditors in both systems had an accommodative approach towards over-indebted debtors.

Question 1.3

England and America each have their own single unified piece of insolvency legislation which apply to both personal and corporate insolvency. Select from the following the best response to this statement.

(a) This statement is true since England has the unified 1986 Insolvency Act and the USA has the 1978 Bankruptcy Code. Both Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is true since in England its companies' legislation deals with corporate insolvency and rescue.

Question 1.4

There are no good reasons to distinguish between insolvency rules pertaining to individuals (consumers, natural person debtors, also referred to as personal insolvency) and those insolvency rules applying to corporations or companies since in both instances the applicable insolvency rules are intrinsically collective in nature. Select from the following the best response to this statement.

(a) The statement is true since global insolvency law systems provide exactly the same rules to cover all aspects of insolvency in both instances, ie personal insolvency and corporate insolvency.

(b) The statement is untrue since there are pertinent differences in the treatment of certain aspects in insolvency of an individual and that of a company, like the fact that individuals are not "dissolved' after their estate assets have been liquidated as is the case once the assets of a company have been liquidated and it is finally wound up.

(c) The statement is untrue since insolvency law rules are not collective in nature.

(d) The statement is true since insolvent companies usually survive their liquidation and may continue to conduct business after the debt has been discharged through the liquidation process.

Question 1.5

All countries have one and the same set of rules to apply in the case of recognition of a foreign insolvency order. Select from the following the best response to this statement.

(a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.

(b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

(c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.

(d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.

Question 1.6

The domestic corporate insolvency laws of a particular country make no mention of the possibility of a foreign element in a liquidation commenced locally. There is also no locally applicable treaty or convention on insolvency proceedings in place.

In a local liquidation commenced in that country, to what other area of domestic law can the local court refer in order to resolve an insolvency related international law issue that has arisen because of concurrent insolvency proceedings over the same debtor in a different country?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

Private international law raises questions of the conclusive effect of a foreign judgment and the enforcement of a foreign judgment. A German court has issued a judgment in a German insolvency which has a connection with England. The foreign

insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is true?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.8

Which of the following best describes international insolvency law?

(a) It is public international law governing insolvency law between States.

(b) It is private international law governing insolvency law between States.

(c) It may involve aspects of both public international law and private international law.

(d) It involves a simple classification within either public international law or private international law.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the best response to this statement.

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(c) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

(d) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

Question 1.10

Latin American States have some of the most long-lasting multilateral agreements regarding international insolvency issues. Select from the following the best response ***to this statement.***

(a) This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.

(b) This statement is untrue because North America was not a party to these agreements.

(c) This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.

(d) This statement is true because of agreements such as the Montevideo Treaties and Havana Convention on Private International Law.

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate the historical roots of the various insolvency law systems to be found in African jurisdictions.

In general, African countries have taken different roots regarding their law system, especially because most of them follow the law models adopted in their formal colonizer's countries. While countries like Nigeria, Kenya and Zambia apply the English Law tradition, Angola and Mozambique are structure in the civil law. In terms of the insolvency law, it is reasonable to state that most of their legislation is imported from foreign countries. However, some of them are developing more modern and updated legislation, which might better address their current issues and concerns.

There is scope to elaborate regarding French law origins and mixed law.

2

Question 2.2 [maximum 3 marks]

Indicate what important events and / or developments gave rise to some insolvency law reform in Eastern Asia and provide two examples of such reform initiatives.

The 1998 financial crisis in East Asia is one of the most important event that triggered insolvency law reforms in this continent. Examples: (1) Thailand reformed its bankruptcy law; and (2) Singapore, in October 2018, unified in a Sigle Act its corporate and personal insolvency and restructuring.

Further detail was needed to achieve full marks.

2

Question 2.3 [maximum 4 marks]

Briefly indicate the various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada and the success or otherwise of these initiatives.

The first initiative occurred in the 1970s, when Canada and the United Stated tried to implement a bilateral insolvency treaty to regulate international insolvency issues between them. They failed, however, to reach an agreement. Notwithstanding this failed attempt, the American Law Institute has been working towards the resolution of these issues, especially encouraging the co-operation among NAFTA's countries, and establishing principles that seek to address matters related to corporate insolvency.

There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

2

Marks awarded 6 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.

The treatment of voidable dispositions plays a crucial role in insolvency systems. These rules, in general, ultimately repudiates the actions of a debtor or a creditor prior to the bankruptcy liquidation or other insolvency regime that have the effect of allowing one creditor or other third party (or insider) to obtain an unfair advantage at the expense or to the detriment of other creditors and stakeholders, which shall harm the values for

creditors and debtors, and the equality of treatment and distribution amongst creditors[1]

In the civil law system, these rules have been mostly influenced by the "Actio Pauliana". On the other hand, the "Act of Elizabeth of 1570" is the basis of these rules in the common law system.
Notwithstanding this fact (i.e., different acts providing the basis of the civil and common law systems), it is necessary to observe that they (the rules) are in general similar, differing mostly in details around the remedies that shall be applied for such voidable dispositions and also the extend and nature of the defenses of good faith and lack of knowledge[2]***.***
The reason for this similarity might be explained by the fact that, on a principle basis, the developments of insolvency law as a system is the same in all systems, especially because the civil and the common law systems have the same historical roots, originally initiated in the ancient Roman Law.

5

Question 3.2 [maximum 5 marks]

A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:

> ***"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."***

However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.

As described by the author, this definition is limited since it is connected to the existence of a national legal framework of insolvency law. The reality, however, is very different. Countries have their own insolvency laws, with specific rules and principles addressing their own realities. In most cases, these countries have poor dispositions regarding cross-border insolvency cases, which raises complex issues and discussions regarding the conflict of this national rules (majority of relevant corporate insolvencies are not limited to one single State, but, on the other hand, with multiple States and multiple insolvency rules). Co-ordination and co-operation, therefore, are fundamentals principals that must be encouraged by countries to avoid disputes and clashes arising from the shock of national insolvency laws.

[1] *See "Insol International – Avoidance of Antecedent Transactions and Cross-Border Insolvency: Brazil".*
[2] *See, eg, JL Westbrook, "Choice of Avoidance Law in Global Insolvencies", (1991), Brooklin Journal of International Law, pp 449 to 538.*

There is scope to elaborate.
4.5

Question 3.3 [maximum 5 marks]

Briefly discuss treaties or conventions as a source for cross-border insolvency law. In your answer you should also indicate if these are viewed as a successful way in establishing such rules by providing examples in this regard.

The experience confirms that treaties and conventions play a very important hole for cross-border insolvency law, especially addressing issues arising from international insolvencies relates especially to the conflict of domestic laws. Some examples of important treaties are (i) the long-lasting treaties achieved by Latin America (e.g., the Montevideo Treaties and Havana Convention on Private Law); (ii) the Nordic Convention, which promoted the unification of the insolvency proceedings among the members of this Convention; and (iii) the OHADA treaty, that incremented the development of African countries on this matter.

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

3
Marks awarded 12.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Flor Prim Pty Ltd (FPPL) is a company incorporated with its head office and significant operations in Encanto as well as being registered as a foreign company in Asgard, where it also carries on business. FPPL therefore carries on business in more than one State. Lobo Lending Ltd (Lobo) is incorporated and has its head office in Asgard.

FPPL is managing to meet its debts as they fall due in Encanto. However, due to various staffing issues combined with market turndown in Asgard, FPPL is struggling financially in Asgard. FPPL has fallen behind with payments due and owing to Lobo. FPPL's CEO approaches Lobo to discuss possible informal payment arrangements.

If you require additional information to answer these questions, briefly state what it is and why it is relevant.

Question 4.1 [Maximum 5 marks]

What are the main differences between "formal" insolvency proceedings and "informal" insolvency arrangements? What key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?

The main differences are: (i) formal insolvency proceedings are commenced under the insolvency law and are governed by that law, while informal insolvency arrangements

are not always regulated by the insolvency law; and (ii) formal insolvency proceedings includes both liquidation or reorganization / rescue proceedings, while informal insolvency arrangements involves voluntary negotiations between the debtor and its creditors.

Disadvantages of the informal arrangements are: (i) there is no moratorium in place preventing other creditors from approaching the courts and commencing an insolvency proceeding; and (ii) there is no way of binding dissenting creditors to any agreement reached.

Advantages of the informal arrangements are: (i) cost significantly lower; and (ii) no publicity of the fact that the debtor is experiencing financial difficulties.

Also, it is made more complex by FPPL carrying on business in more than one State because it is more complicated and costly to monitor the other creditors.

4.5

Question 4.2 [Maximum 5 marks]

Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments that have been developed to assist with respect to those difficulties. In your answer make sure to comment as to whether the development of these international insolvency instruments is important and why, or why not.

The first difficulty that may arises from this situation is establishing and conciliating the definition of "insolvency" withing Encanto's and Asgard's domestic legislation. These jurisdictions might not adopt similar concepts, what can potentially create discussions around the factors that must be observed in order to declare the company insolvent.
Moreover, the representative may also face conflicts of domestic laws especially related to the position of creditors in a potential insolvency proceeding, the priorities these creditors might have over the debtors' assets, and procedures rules, for example, security, set-off and netting arrangements.
Summarizing these difficulties, Westbrook identifies 9 (nine) main issues in cross-border cases: standing for the foreign representatives, moratorium on creditor actions, creditor participation, executory contracts, co-ordinated claims procedures, priorities and preferences, avoidance provision powers, discharges and conflict-of-law issues.
There is scope to elaborate regarding concurrent proceedings and territorial approaches.

The main instruments that have been developed to work out these difficulties are treaties and conventions. Co-operating with them, multilateral commerce and professional bodies have been working on proposed solutions, seeking to promote (i) the harmonization of domestic law; (ii) the unification of choice of law principles and recognition of laws; and (iii) co-operation and co-ordination among different jurisdictions Elaboration is needed regarding the main instruments you are referring to

The instruments indicated above have been playing a very important role to address insolvency issues and discussions arising from several domestic insolvency laws existing worldwide, promoting among them some kind of unification that enables the better treatment of debtors' and creditors' interests and rights within cross-border insolvency cases.

2.5

Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FFPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.

First, it is fundamental to note that UK ceased to be a member of the EU at 11pm on January 31, 2020. Therefore, the EIR Recast no longer applies to post-11pm 31 December 2020 proceedings in the UK. The Recast, then, applies to insolvencies where the main proceedings were opened prior to the expiry of the transitional period (i.e., 11pm – December 31, 2020).

Due to the above, the EIR Recast does not apply with respect to the UK commenced insolvency proceedings.

The EIR provides that the COMI (canter of main interests) of the EU's members is the key to allocate jurisdictional competence. It also provides the possibility of subsidiary territorial proceedings in other member States, provided that the debtor has a establishment in this location. The UK insolvency Act 1986, on the other hand, provides that English Courts have jurisdiction to wind-up a company formed in another state and that has carried on business in England. Important to observe that English law applies to matters of procedures and substance, while a foreign law may govern aspects of the administration of the winding-up.
It would be beneficial to know if the MLCBI has been adopted.

3.5

Marks awarded 10.5 out of 15

* End of Assessment *

TOTAL MARKS 38/50

A very good paper that generally addresses the questions asked and substantiates its answers.